Office - Supreme Court, U.S.
FILED
OCT 29 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-530

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

JOHN HENRY KNAPP, Arizona State Prison Inmate No. 33659, and all inmates of the Arizona State Prison similarly situated,

Petitioners,

vs.

HAROLD CARDWELL, et al.,

Respondents.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. HAVE THE FEDERAL COURTS BELOW SO MISCONSTRUED THE NATURE OF THE ARIZONA SUPREME COURT'S ACTION IN REINTERPRETING THE ARIZONA CAPITAL PUNISHMENT STATUTE THAT THOSE FEDERAL COURTS HAVE ERRED IN FINDING CONSTITUTIONAL THE DEATH SENTENCES IMPOSED IN RESENTENCINGS NECESSITATED BY THAT REINTERPRETATION?

2. DO THE RESENTENCINGS TO DEATH VIOLATE EITHER THE DOUBLE JEOPARDY CLAUSE OR EX POST FACTO CLAUSE, ESPECIALLY IN LIGHT OF BULLINGTON v. MISSOURI?

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REASONS FOR DENYING THE WRIT

I. THIS CASE HAS NEITHER THE IMPORTANCE NOR THE IMMEDIACY PETITIONERS SEEK TO GIVE IT.

Petitioners begin by seeking to impress the Court, declaring that this case is "uniquely different" because "dozens of lives stand immediately at stake". (Petition at 5.) That statement is both wrong and offensive in its implications. It is wrong because, although this is concededly a class action, every capital case this Court deals with potentially affects dozens of lives; regardless of whether one petitioner or several are involved in the case actually heard by the Court, the ramifications necessarily are nation-wide, so this case is not really unique at all. Moreover, while any action (or refusal to act) by this Court is obviously an important step in the proceedings, lives do <u>not</u> "stand immediately at stake, abiding only the ruling of this Court". (Petition at 5.) A denial of certiorari will not be the cue for immediate mass executions; for example, both the District Court and the Court of Appeals specifically refused to rule on the speedy sentencing issues because of the need for individual adjudication of such claims. (Petition at

18a and 51a-52a.) Moreover, most if not all members of the class have yet to seek whatever habeas corpus relief may be available to them because of claims arising from their individual cases. Hence, a denial of this petition will not propel anyone directly into the gas chamber.

Petitioners' statements are offensive because they imply that merely parading a body count before the Court somehow imparts merits to their claims. This Court has previously indicated that it considers it important any time the state contemplates "taking the life of one of its citizens", Gardner v. Florida, 430 U.S. 349, 358 (1977), so the suggestion that it is necessary to wave multiple bloody shirts to get the Court's attention is totally unwarranted. On the other hand, this Court's workload is already so overwhelming that it must choose its cases carefully, and ought not be stampeded into decisions by such blatant emotional appeals. As the Court well knows, even death penalty cases can be and often are frivolous from the point of view of legal merits.

II. THE USE IN STATE V. WATSON OF THE TERM "SEVER" TO CHARACTERIZE THE ARIZONA SUPREME COURT'S REINTERPRETATION OF THE DEATH PENALTY STATUTE DOES NOT CONFLICT WITH THE FEDERAL COURTS' UNDERSTANDING OF WHAT THE ARIZONA COURT HAD DONE, SO IT CANNOT BE SAID THAT THE FEDERAL COURTS FAILED TO ACCEDE TO THE STATE COURT'S INTERPRETATION OF THE STATE STATUTE.

Petitioners' second "reason" for granting the writ is an effort to conjure up a phantom constitutional problem out of nothing more than inartful word choice by the Arizona Supreme Court. Former Ariz. Rev. Stat. Ann. §13-454(F), the list of mitigating factors to be considered in determining whether the death penalty should be imposed, simply stated: "Mitigating circumstances shall be the following..." This is neutral, somewhat ambiguous language, which with equal logic can be construed to mean either that the list is exclusive, and that other mitigating circumstances may not be considered, or that the list is the minimum group of variables which the sentencing court must consider, and that additional, unlisted mitigating circumstances may also be considered. The Arizona Supreme Court originally adopted the first, limited interpretation, in State v. Richmond, 114 Ariz. 186, 560 P.2d 41

(1976), cert. denied 433 U.S. 915 (1977). However, after this Court's decision in Lockett v. Ohio, 438 U.S. 586 (1978), that such a limitation on mitigating circumstances is not constitutionally acceptable, the Arizona Supreme Court reassessed the statute, in State v. Watson, 120 Ariz. 441, 586 P.2d 1253 (1978), cert. denied 440 U.S. 924 (1979), which is reproduced as Appendix C (53a-74a) of the Petition. Watson determined that, "had the legislature been aware of the unconstitutionality of the limitation on mitigating circumstances, they would have enacted the remainder of the statute without what is now the offending portion", so the limitation on mitigation was held to be "severable". (120 Ariz. at 444-445, 586 P.2d at 1256-1257.) This holding as to "severability" was reaffirmed in the supplemental opinion issued in response to a motion for rehearing. (120 Ariz. at 451-454, 586 P.2d at 1263-1266.)

The difficulty with the word "severable" is that the Arizona Supreme Court did not actually excise any words from the statute; all that was changed was the interpretation of the aforementioned ambiguous

language in §13-454(F), so that the list of mitigating factors would no longer be deemed to be exclusive. It is on this slender semantic thread that petitioners' argument hangs. Petitioners seem to concede that if the Arizona Supreme Court had simply characterized its action as a reinterpretation of the statute, that would have been unobjectionable. However, because the word "severable" is used, they claim that "The Watson court... proceeded to promulgate a new subsection (F) of the court's own making, rewriting the statute in an attempt to conform to Lockett." (Petition at 5.) This is far-fetched; this Court will no more find anything added to the wording of the statute by the Watson decision than it will find that any statutory language was excised by that decision. Then petitioners argue that, because the Federal District Court and the Circuit Court of Appeals treated Watson as a reinterpretation of the statute or an overruling of State v. Richmond, those courts have disregarded the Arizona Supreme Court's own view and have placed themselves in conflict with the rule that state courts are the ultimate expositors of their own

laws. (Petition at 5-9.)

Far from contravening the rule of state court primacy in state law interpretation, the lower federal courts have affirmed and upheld that rule, by applying it in a reasonable, common sense fashion and refusing to engage in the verbal snipe-hunting promoted by petitioners. The federal courts below have accepted the Arizona Supreme Court's action completely, regardless of the nomenclature applied to it. (See the Appendices to the Petition at 6a-11a and 33a-42a.) It is petitioners who attempt to overthrow a wholly reasonable interpretation of state law by a state court, in the absence of any "extreme circumstances", and in despite of the carefully considered conclusions of two federal courts. Thus, petitioners impugn Mullaney v. Wilbur, 421 U.S. 684 (1975), as well as colliding with this Court's "two court rule", which counsels extra restraint in granting review of cases where multiple courts below have been uniform in their findings and there is no obvious and exceptional show of error. See Berenyi v. Immigration Director, 385 U.S. 630, 635 (1967); Estelle v. Williams, 425 U.S. 501 (1976) (Douglas,

J., dissenting).

It is therefore plain that this Petition should be rejected, and this Court need not hesitate in doing so because of the superficially impressive array of cases presented in it. (See Petition at 6-9.) Hicks v. Oklahoma, 447 U.S. 343 (1980), actually tends to support the sort of resentencing directed by Watson. In that case this Court held that a defendant, who had been deprived of adequate consideration of his sentence by a jury because of improper instructions, was entitled to be resentenced, even though the sentence already imposed was within the range the jury might still impose. The Watson decision does precisely the same thing -- authorizes resentencing, after an appeal by the defendant, to allow consideration of an improperly excluded, sentence-relevant factor. Whalen v. United States, 445 U.S. 684 (1980), specifically pointed out that the sort of legislative construction there engaged in by this Court was permissible only because federal rather than state law was involved. 445 U.S. at 687-688. Ashton v. Kentucky, 384 U.S. 195 (1966), held that a conviction under a defective statute

could not be saved by a subsequent, limiting construction of the statute, but it has nothing whatever to say about sentencings or what the state could do once the original conviction was reversed. In United States v Jackson, 390 U.S. 570 (1968), this Court refused the government's suggestion that the federal kidnapping death penalty statute be saved, not by interpretation, but by constructing out of whole cloth a novel hearing procedure which had no basis in the statute itself, in the discernible congressional intent, or in other areas of Federal law. That is a far cry from the very limited action, based on reasonably clear legislative intent, undertaken in Watson.

Thus, not one of petitioners' federal cases actually supports their position, and the same is true of their state cases. The six state court decisions listed in the Petition at page 7 as refusing to engage in reinterpretation of their respective death penalty statutes are distinguishable in that all of them involved mandatory capital punishment. When that approach was held by this Court to be unconstitutional, the whole essence of

those statutes was gone, so there was virtually nothing left to "reinterpret". That, of course, is very different from the situation here, where Arizona had a fundamentally sound statute, which gave guided discretion to the decision maker, but had simply been too narrow in its guidelines. This distinction was explicitly recognized in one of petitioners' own cases, State v. Lundquist, 99 Idaho 766, 589 P.2d 101, 104-105, n.1 (1979).

Petitioners' Arizona cases are equally useless. It is certainly true (Petition at 7) that the Arizona courts insist on interpreting the actual language of prior opinions, not informal expressions of intent, but that really has nothing to do with the issues here. The Arizona Supreme Court has repeatedly demonstrated its willingness to reinterpret and overrule its prior decisions, even those of substantial age, if cogent reasons for doing so are demonstrated. See, e.g., State v. Harvill, 106 Ariz. 386, 476 P.2d 841 (1970); Prudential Insurance Company of America v. O'Grady, 97 Ariz. 9, 396 P.2d 246 (1964); State v. Allred, 67 Ariz. 320, 195 P.2d 163 (1948); Crane Company v. Arizona State Tax

Commission, 63 Ariz. 426, 163 P.2d 656 (1945). Thus, there was no peculiarity or subterfuge present in that court's action in Watson. Moreover, that the Arizona Supreme Court persisted in its use of the unfortunate term "severance" for its action in Watson (Petition at 8-9) does not prove that it believed that it had actually excised §13-454(F) from the statute books. Far more persuasive is the fact that it has continued to cite to and even quote from that subsection in post-Watson cases. See, e.g., State v. Jordan, 126 Ariz. 283, 290, 614 P.2d 825, 832 (1980), cert. denied 449 U.S. 986; State v. Steelman, 126 Ariz. 19, 27, 612 P.2d 475, 483 (1980), cert. denied 449 U.S. 913; State v. Brookover, 124 Ariz. 38, 41, 601 P.2d 1322, 1325 (1979).

III. THE RESENTENCING OF PETITIONERS VIOLATES NEITHER THE DOUBLE JEOPARDY CLAUSE NOR THE EX POST FACTO CLAUSE.

Petitioners next assert that resentencing them offends the Double Jeopardy Clause, claiming that "once the Arizona statute was declared unconstitutional the sentences of the class members automatically became life imprisonment". (Petition at 9.) If this were true, a new death sentence would

be an increase in penalty, and an obvious double jeopardy violation, but it is not true. The Arizona Supreme Court dealt with this question directly:

> Defendant finally points to Chapter 138, Laws of 1973, Section 10. This provision is not contained in the bound volumes of the Arizona Revised Statutes. It is, however, a part of the legislation passed in 1973. The provision reads:
>
> "In the event the death penalty is held to be unconstitutional on final appeal, a person convicted of first degree murder or another offense punishable by death who has been sentenced to die shall be resentenced by the sentencing court to life imprisonment without possibility of parole until the person has served a minimum of twenty-five calendar years." Sec. 10, Ch. 138, Laws 1973.
>
> Defendant contends that since we have found the death penalty unconstitutional, we therefore must sentence the defendant to twenty-five years. We do not agree.
>
> We did not find the death penalty to be unconstitutional. We held only that in determining the death penalty there are certain factors which, if presented by the defendant, the court must consider. The statute, as severed, is valid.
>
> * * *
>
> [D]efendant cites several cases, two from California, People v. Harvey, 76 Cal.App.3d 441, 142 Cal.Rptr. 887 (1978) and People v. Payne, 75 Cal.App.3d 601, 142 Cal.Rptr. 320 (1977), as well as the South Carolina case of State v. Rodgers, 242 S.E.2d 215 (S.C. 1978) in support of his position. All three

> of these cases are distinguishable. In each of those cases, the defendants, after having been sentenced to death, had their sentences reduced to life imprisonment. After they had commenced to serve the life sentences, the state sought to have them resentenced under legislation enacted after the crime and the reversal. Thus, after the life sentences were at least partially served, the state attempted to subject them to another different and higher punishment. The California court said in Harvey, supra, that when a new death penalty statute was enacted in August of 1977 and the state sought to have the case returned to the trial court for resentencing under the valid 1977 statute, it was double jeopardy. We agree with the California court, but these cases are clearly distinguishable and do not apply to the case at bar. The defendant in the instant case never served his sentence (of death). His death sentence was not reduced to life imprisonment but was merely set aside pending resentencing. We find no violation of the double jeopardy clause in the instant case. See also North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969).
>
> State v. Watson, supra, 120 Ariz. at 453, 586 P.2d at 1265.

The state court being the ultimate expositor of the intent and operation of state law under Mullaney v. Wilbur, supra, this Court must accept the conclusions that the whole statute was not declared unconstitutional, that the savings clause was not triggered, and that the class members never received any life sentences. This being so, there was no

added punishment in resentencing them to death and no double jeopardy problem. The language petitioners cite from Dobbert v. Florida, 432 U.S. 282, 301 (1977), does not alter that outcome. The language actually comes from a discussion of an equal protection claim, not a double jeopardy question. Moreover, the Court upheld the Florida Supreme Court's line-drawing with regard to who would or would not be resentenced under a new statute on the basis that it was done on a rational basis. 432 U.S. at 301. The actions of the Arizona Supreme Court are also, clearly, a rational response to the problems posed by this Court's decision in Lockett v. Ohio. Therefore, to the extent that Dobbert relates to this point at all, it supports the Watson decision and militates against granting the writ.

Petitioners also cite as a "separate and distinct double jeopardy violation" (Petition at 9) the fact that no member of the class was a party to the litigation in which their original death sentences were vacated. This argument must be rejected for a number of reasons: First, it is plainly false. Spencer Watson is listed on page i of the Petition as

a member of the class. While his personal claim has since been mooted by a resentencing to life imprisonment (129 Ariz. 60, 628 P.2d 943), the fact remains that a member of the class was indeed a party to the litigation. Second, this issue sounds like a collateral estoppel question, not anything related to double jeopardy. Third, the issue is not properly before the Court. Insofar as counsel for respondent can determine, the only time the matter has ever been raised before is in the Memorandum by amici in support of the Motion for Rehearing in the Ninth Circuit. It is improper to raise wholly new issues in a motion for rehearing. See, e.g., Mitchell v. Greenough, 100 F.2d 1006 (9th Cir. 1939), and cases cited therein. It is similarly inappropriate for an amicus to inject into the case a completely new claim which the party supported has not seen fit to raise. The matter not having been brought properly to the attention of the courts below, and not having arisen out of intervening legislation or decision, it is not properly before this Court and must be disregarded.

Finally, with regard to petitioners' analogy to the state being precluded from taking a "second

swipe" at the class members (Petition at 10), it should be noted that the state did not "miss on the first swing". On the contrary, the state "connected" on the first swing, and each class member was sentenced to death, but Lockett raised a question about whether the "hit" was fairly come by. Therefore, petitioners have been given a "second chance for life" (cf. Dobbert v. Florida, 432 U.S. at 296) which they could not have expected. That is double opportunity, not double jeopardy.

Petitioners also raise an Ex Post Facto Clause claim, relying on language from Dobbert v. Florida, supra. (Petition at 10.) However, as previously noted, that language is actually addressed to an Equal Protection claim, so it is of dubious applicability in any other context. To the extent that the so-called "bulk of the lower court case law and the better reasoned constitutional and common law analysis" relies on this tangential verbiage, it is clearly wrong. Far more germane is the explicit holding of Dobbert that alterations in practice which are procedural and ameliorative cannot, by definition, constitute violations of the Ex Post

Facto Clause. That, of course, is what happened here. Pursuant to Watson no new or different penalty can be imposed, and petitioners have not only a second opportunity to persuade the sentencer that they should be given life, the range of evidence they may present has also been expanded to the horizons of relevance. That offends neither the Double Jeopardy Clause nor the Ex Post Facto Clause.

IV. BULLINGTON v. MISSOURI IS OF SUCH QUESTIONABLE VALIDITY THAT IT SHOULD NOT BE APPLIED AT ALL, BUT EVEN IF BULLINGTON IS RETAINED, IT IS DISTINGUISHABLE FROM THE PRESENT CASE IN SO MANY WAYS THAT ITS REASONING PROVIDES NO JUSTIFICATION FOR GRANTING THE WRIT, ESPECIALLY SINCE ANY DECISION WOULD PROBABLY BE ONLY ADVISORY AND WOULD RESOLVE NO ACTUAL CASE OR CONTROVERSY.

Finally, petitioners argue that there exists the potential for a Double Jeopardy Clause violation under Bullington v. Missouri, 451 U.S. 430, 101 S.Ct. 1852 (1981), if when they are resentenced they again receive the death penalty and that penalty is based upon aggravating circumstances not found when they first were sentenced to death. Merely to state the issue is to demonstrate that it is a matter not congenial to resolution in the present proceedings. It hardly seems reasonable that a prosecutor who

actively seeks the death penalty for a defendant will hold back anything relevant to aggravating circumstances, so the likelihood of new aggravating circumstances being alleged, proved, and relied on seems to be small. Moreover, since there are now no restrictions on what may be introduced by way of mitigation, the probability that some petitioners will be sentenced to life on resentencing is substantial. See, e.g., State v. Watson, 129 Ariz. 60, 628 P.2d 943 (1981). Hence, any ruling by this Court may well turn out to be purely advisory. While the Petition at page 11 points to an instance in which a class member was resentenced to death and there was a finding of new aggravating circumstances, it is worthy of note that in that case the Arizona Supreme Court affirmed the death sentence without relying on the newly-found aggravating factors. State v. Jordan, 126 Ariz. 283, 614 P.2d 825 (1980), cert. denied 449 U.S. 986 (1981). Another class member discussed by both the federal District Court Judge and by Judge Adams in his Ninth Circuit dissent, whose resentencing to death relied at least in part on newly-found aggravation, has finally been

given a life term. See State v. Valencia, ___ Ariz. ___, 645 P.2d 239 (1982). In 19 resentencings pursuant to Watson, there have been only 3 cases in which new aggravating factors have been found by the sentencer, and in none of those has the Arizona Supreme Court relied on the newly-found aggravation.[1] Should it ever decide to do so, this Court can take up an actual case and controversy and resolve the issue with precision, but to grant the writ to examine the question in the context of this case would seem to violate this Court's long-standing rule of refusing to deal with Constitutional issues where it is not really necessary to do so.

Should the Court be tempted to grant the writ, despite the fact that any opinion it issues on this question would probably be of nothing more than academic interest, certain other factors should be considered. Petitioners are seeking to expand the

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[1] State v. Jordan and State v. Valencia have already been discussed. State v. Blazak, 114 Ariz. 199, 560 P.2d 54 (1977), and 131 Ariz. 598, 643 P.2d 694 (1982), resembles Jordan in that, although one additional aggravating circumstance was found, it was really superfluous because there were already several aggravating circumstances and no mitigating circumstances.

applicability of Bullington v. Missouri beyond its rather limited facts. That is no good reason for granting their petition because there exist substantial doubts as to whether Bullington itself was rightly decided. Justice Powell's dissenting opinion makes very clear that Bullington is a totally unwarranted departure from the previous decisions of this Court. By wandering away from the clear teaching and predictable standard of cases such as North Carolina v. Pearce, 395 U.S. 711 (1969), and United States v. DiFrancesco, 449 U.S. ___, 101 S.Ct. 426 (1980), that the implied acquittal doctrine does not apply to sentencing situations, the Court in Bullington propelled itself into a morass of distinctions without substantive differences, much as it did in the Fourth Amendment context in Robbins v. California, 453 U.S. 420 (1981). The only reason this Court should grant review of a Bullington-based petition is to overrule Bullington, as Robbins was eliminated in United States v. Ross, ___ U.S. ___, 102 S.Ct. 2157 (1982), not to extend Bullington.

Even if Bullington is allowed to stand there are very substantial differences between it and this

case, which militate against granting the petition. To begin with, Bullington explicitly limited itself to jury sentencing situations:

> The issue in the present case is whether the reasoning of Stroud is also to apply under a system where a jury's sentencing decision is made at a bifurcated proceeding's second stage at which the prosecution has the burden of proving certain elements beyond a reasonable doubt before the death penalty may be imposed.
>
> 101 S.Ct. at 1854 (emphasis added).

Former Ariz. Rev. Stat. Ann. §13-454, under which all members of the class were sentenced and would be resentenced, provided for sentencing to be done by the judge, not a jury. This has been held to be a significant factor in determining that Bullington did not apply so as to preclude a resentencing to death under Montana's capital punishment statute. See Fitzpatrick v. State, 638 P.2d 1002, 1016-1017 (Mont. 1981). Second, Bullington placed great weight on the similarities between a Missouri trial on the merits and the nature of the presentencing hearing; so great are the similarities that the hearing is spoken of by the Missouri statute itself as being simply a resumption of the trial, and all the usual trappings

of trial (jury argument, instructions, etc.) are required. 101 S.Ct. at 1855, n.4, and 1858, n.10. The great differences between this statute and the non-trial-like Arizona procedure were a major factor in the Ninth Circuit's rejection of petitioners' Bullington claim. (See Petition at 17a.) The same sort of procedural distinctions also figured largely in State v. Fitzpatrick, supra.

Third, this Court in Bullington was concerned about the prosecution having "the opportunity to convince a second factfinder of its view of the facts"; indeed, this was the main basis on which Bullington was found to differ from United States v. DiFrancesco, supra. (See 101 S.Ct. at 1859.) However, there is only one factfinder involved in sentencings or resentencings in Arizona capital cases. Barring some form of legal or actual incapacity, the same judge who originally sentenced each petitioner does the resentencing as well. Ariz. Rev. Stat. Ann. §13-703(B), as amended by 1982 Ariz. Sess. Laws ch. 238, §2.

Fourth, and far more important even than the preceding distinctions, is the fact that every one of

the class members (unlike Robert Bullington) had already been sentenced to death. To resentence them to death, even relying on new aggravating factors, in no way imposes a different or harsher penalty than had already been assessed against them; it is not obtaining something which the sentencer had refused to give the first time. The importance of this fact is indicated by this Court's reliance in Bullington on Green v. United States, 355 U.S. 184 (1957), and Bullington's recognition of the continued viability of Stroud v. United States, 251 U.S. 15 (1919). (See 101 S.Ct. at 1854, 1858-1859.) The essence of Bullington is an application of the implied acquittal doctrine discussed in Green. Green held that it violated the Double Jeopardy Clause to retry a defendant for first degree murder when a jury failed to act on a first degree charge but convicted of second degree murder, because the conviction of the lesser offense was an implied acquittal of the greater offense. However, Green specifically distinguished itself from Stroud, on the grounds that "In that case a defendant was retried for first degree murder after he had successfully asked an

appellate court to set aside a prior conviction for that same offense." 355 U.S. at 195, n.15 (emphasis added). The clear implication is that the implied acquittal doctrine applies only to the extent that the government seeks to "up the ante" in the renewed proceedings, the prosecution is not barred by the Double Jeopardy Clause from proceeding with a new trial on a charge no greater than the one on which the defendant was originally convicted. This being so, there is likewise no Double Jeopardy bar to obtaining a second sentence which is no greater than that originally imposed -- life in Bullington, and death in petitioners' cases. Such was the conclusion of the Ninth Circuit in this case (see Petition at 17a) and of the state court in Hopkinson v. State, 632 P.2d 79, 172, n.46 (Wyo. 1981), cert. denied ___ U.S. ___, as well as of a line of Georgia cases. See Godfrey v. State, 248 Ga. 616, 284 S.E.2d 422 (1981); Zant v. Redd, 249 Ga. 211, 290 S.E.2d 36 (1982); and Patrick v. State, 249 Ga. 293 S.E.2d 329 (1982).

Yet another important distinciton brought out in the Georgia cases is the precise nature of an aggravating circumstance, which is radically

different from either an offense (such as was considered in Green v. United States) or a penalty (the subject of Bullington). Analyzing the Bullington decision, the Georgia Supreme Court stated:

> The court essentially equated the question of life or death to an offense and found that a decision of life or death deserved the same finality as a decision on guilt or innocence. It noted that the defendant faces "'anxiety and insecurity'" when facing the death penalty.
>
> We refrain from equating "aggravating circumstances" to an offense. See, Redd v. State, 242 Ga. 876, 885, 252 S.E.2d 383 (1979); Green v. State, 246 GA. 598(8), 272 S.E.2d 475 (1980).
>
> Aggravating circumstances are procedural standards designed to control a jury's discretion in capital cases in order to ensure against capricious and arbitrary enforcement of the death penalty. See, Gregg v. Georgia, 428 U.S. 153, 197-98 (1975) 96 S.Ct. 2909, 2936, 49 L.Ed.2d 859 (1975), reh. den., 429 U.S. 875, 97 S.Ct. 197, 50 L.Ed.2d 158 (1976). Aggravating circumstances are not substantive "penalties" or "offenses"; they do not place the defendant's life in peril or subject him to a possible "conviction"; they are standards which guide a jury's decision on what does place the defendant's life in jeopardy at the sentencing trial -- the death penalty.
>
> As we have determined that double jeopardy does not apply to aggravating circumstances, we apply the established double jeopardy rule to the sentencing phase of Redd's trial, i.e., that on a trial on guilt or innocence, if a defendant is

> found guilty and convicted but overturns his conviction on legal grounds, the slate is wiped clean, the conviction nullified, and the state and the defense start anew. Godfrey v. State, 248, Ga. 616(1), 284 S.E.2d 422 (1981); North Carolina v. Pearce, 395 U.S 711, 720-21, 89 S.Ct. 2072, 2078, 23 L.Ed.2d 656 (1969); United States v. Tateo, 377 U.S. 463, 466, 84 S.Ct. 1587, 1589, 12 L.Ed.2d 448 (1963).
>
> Zant v. Redd, supra, 290 S.E.2d at 38-39.

Based on this reasoning, there is no reason why the prosecution should be barred from presenting aggravating circumstances not found during the original sentencing.

Finally, it is important to note the clear distinctions that exist between Bullington and the present case with regard to the type of errors which are involved. In Bullington the error which caused the retrial and thereby gave birth to the resentencing problem was a matter of jury selection; the procedural integrity of the original sentencing procedure was never impugned. Further, the critical point in the Double Jeopardy analysis was the conclusion that there had been an implied acquittal, i.e., an apparent finding of insufficient evidence to support a death sentence. The very opposite is true

here: the original error went directly to the heart of the sentencing process (in the integrity of which the state also has an abiding interest), but was not a question of sufficiency of evidence, because all members of the class actually were sentenced to death. Such a situation clearly invokes Burks v. United States, 437 U.S. 1, 15 (1978):

> Various rationales have been advanced to support the policy of allowing retrial to correct trial error, but in our view the most reasonable justification is that advanced by Tateo, supra, 377 U.S., at 466, 84 S.Ct., at 1589:
>
> > "It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction."
>
> See Wilson, supra, 420 U.S., at 343-344, n.11, 95 S.Ct., at 1021-1022; Wade v. Hunter, 336 U.S. 684, 688-689, 69 S.Ct. 834, 836-837, 93 L.Ed. 974 (1949). In short, reversal for trial error, as distinguished from evidentiary insufficiency, does not constitute a decision to the effect that the government has failed to prove its case. As such, it implied nothing with respect to the guilt or innocence of the defendant. Rather, it is a determination that a defendant has been convicted through a judicial process which is defective in some fundamental respect, e.g., incorrect receipt or rejection of evidence, incorrect instructions, or prosecutorial

> misconduct. When this occurs, the accused has a strong interest in obtaining a fair readjudication of his guilt free from error, just as society maintains a valid concern for insuring that the guilty are punished. (Emphasis added.)

Imposition of the death penalty in Arizona can result only from a comparison of the aggravating and mitigating circumstances; error as to either one necessarily implicates the integrity of the whole process. To allow introduction pursuant to Lockett of unlimited mitigation at resentencing while precluding admission of relevant evidence of aggravating circumstances inescapably distorts that joint weighing process and grievously abuses the concept of individualized sentencing which underlies Lockett; presumably the intent is to have everything relevant, bad as well as good, fairly presented to the sentencer. That is all that Watson calls for — a full and fair presentation, in one hearing, of both sides. Inasmuch as that harmonizes with this Court's sentencing ideals, it presents no Constitutional error, and needs no correction by this Court. The petition should therefore be denied.

CONCLUSION

In repeated hearings and rehearings every one of petitioners' claims has been rejected by the Arizona Supreme Court, the Federal District Court, and the Ninth Circuit Court of Appeals. Those claims have no more validity now than they did when presented to each of these other tribunals, and do not warrant application of any of this Court's limited resources. The petition should be denied.

DATED this 27th day of October, 1982.

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